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(2)

"allotted by the High Court Legal Services Committee"

IN THE HIGH COURT OF JUDICATURE AT JABALPUR.

CRIMINAL APPEAL NO: 1159 /99

APPEAL UNDER SECTION 374(2) OF CRIMINAL PROCEDURE CODE.

(5420) 5/11/99 by Shri A. Dixit Advocate M.A.P.

APPELIANT : Itwara Bai W/o Bholuram, aged about 50 years, Resident of village-Jondhar, P.S. Mosturi, District-Bilaspur (MP).

VERSUS

RESPONDENT : The State of Madhya Pradesh

(56)

HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No. 838 of 1999

Dulari
Vs.
State of Chhattisgarh

Criminal Appeal No. 1159 of 1999

Itwara Bai
Vs.
State of Chhattisgarh

Judgment for consideration

Sd/-
SUNIL KUMAR SINHA
Judge

Hon'ble Shri Justice L.C. Bhadoo.

I agree

Sd/-
L.C. BHADOO
Judge

Post for 25.09.2006

Sd/-
SUNIL KUMAR SINHA
Judge

(57)

HIGH COURT OF CHHATTISGARH AT BILSPUR

Division Bench: **Hon'ble Shri Justice L.C.Bhadoo,**
Hon'ble Shri Justice Sunil Kumar Sinha,

Criminal Appeal No.838 of 1999

Dulari
Vs.
State of Chhattigarh

Appearance:

Shri P.P.Sahu, counsel for the appellant.

Shri U.N.S. Deo, Govt. Advocate with Shri D. K. Gwalre, Deputy Govt. Advocate, for the State.

Criminal Appeal No.1159/1999

Itwara Bai
Vs.
State of Chhattisgarh

Appearance:

Ms. Meenu Banerjee, counsel for the appellant.

Shri U.N.S. Deo, Govt. Advocate with Shri D. K. Gwalre, Dy. Govt. Advocate, for the State.

JUDGMENT
(25.09.2006)

SUNIL KUMAR SINHA, J,

(1) These appeals have been directed against the judgment of conviction and order of sentence awarded by the IInd Addl. Sessions Judge, Bilaspur, on 06th of March 1999 in Sessions Trial No.257/1998 whereby the learned sessions Judge held the appellants guilty of the offence punishable u/s 302 read with section 34 of the I.P.C. and sentenced them to undergo life imprisonment.

(2) The brief facts are that the deceased namely Bholu Ram was the husband of appellant Itwara Bai. They were residing together in village Jodhra. After 28.3.1998, the deceased was not seen in the village. This was noticed by the villagers and since the appellant Itwari Bai was having illicit relations with the co-appellant Dulari, it was spread in the village that they have killed the deceased and have caused disappearance of the dead body. On this, the Sarpanch alongwith the villagers gave a written report to the Police Chowki, Pachpedi, P.S. Masturi on 09.4.1998 vide Ex.P.14. This report was also entered in *Rosnamcha Sanha* (Ex.P.20-C). On this, the investigation commenced and, since the villagers had expressed their suspicion in the written report regarding murder by the appellants on account of their illicit relations, therefore, they were permitted by the Police to ask about this fact from the appellants. Upon this, on 10.4.1998, these appellants were called by the villagers by Kotwar Jeevan Das in Panchayat Bhawan and they were asked about the incident. The appellants made extra judicial confession before the villagers which was reduced into writing by them in form of a memorandum vide Ex.P.7. According to the confession of Dulari, he assaulted the deceased with the help of Kulhadi on his head (right temple) in the courtyard of the deceased, who fell down. The second blow was given at the instance of the appellant Itwara Bai and the deceased died on the spot. After his death, both the appellants put the dead body in the *Gunni* bag and tied it with the help of a bed sheet and took the body on a bicycle from the house of the deceased to the Bank of River Sheonath and buried the dead

body at a particular place. After this information, the appellants were taken into custody and on 10.4.1998 itself at about 14.30 hours, memorandum statement of Dulari (Ex.P.8) leading to discovery of Tangia, Bicycle, Fowda and Nylon rope was recorded. Another memorandum/statement of Itwara Bai was also recorded which led to discovery of certain articles. Thereafter, with the permission of the State authorities, the dead body of the deceased was exhumed from the place indicated by the appellants at their instance by the Executive Magistrate Mr. M.S. Dubey (P.W.11). The body was identified in *Panchnama* and it was sent for Postmortem which was conducted by Dr. Vinay Gupta (P.W.3) and the report was submitted vide Ex.P.6. The Doctor has noticed the injuries over the body, however, perhaps due to decomposed condition, he could not give any opinion regarding cause and mode of death. During the course of investigation, the Police recorded statements of neighbours of the deceased namely Ganga Bai (P.W.5) and Seorkha (P.W.6) and after recording the statements of other witnesses, charge sheet was filed. The Sessions Court framed common charges u/s 302 read with section 34 and section 201 of the I.P.C. and after conclusion of the trial, convicted the appellants as aforementioned.

(3) The conviction of the appellants is based on circumstantial evidence. The Sessions Court relied upon the following circumstances for holding the appellants guilty of the aforesaid offence.

(i) just in the next morning of the incident, the wife of the deceased i.e., appellant Itwara Bai

stated to her neighbours namely Ganga Bai (P.W.5) and Seorkha (P.W. 6) that on account of fear of police regarding theft of wood, her husband ran away from the village after taking a sum of Rs.1000/- with him.

(ii) There were illicit relations between both the appellants;

(iii) Prior to this incident also the wife of the deceased namely Itwara Bai was burnt by the deceased on account of her illicit relations with the co-appellant Dulari.

(iv) Even if the husband was missing since last 10-11 days, but no report was lodged by the wife to the Police and she had also not given any complaint to the villagers rather she was canvassing regarding abscondence of the deceased on account of fear of police on the pretext of theft of wood;

(v) The factum of extra judicial confession which was made by the appellants in village Panchayat and was recorded vide Ex.P.7;

(vi) The discovery of dead body from a particular place near the bank of river Sheonath at the instance of the appellants particularly in the same condition along with same articles which they had described in their confessions; and

(vii) The memorandum u/s 27 of the Evidence Act, on which discoveries of various articles were made.

(4) Learned counsel for the appellants argued that the circumstance of giving extra judicial confession has not been established and the confession reduced into writing in Ex.P.7 cannot be believed. They further argued that evidence of the witnesses in this regard appears to be unreliable and the

conviction cannot be based on it. They also argued that the other circumstances are also not established in this case so as to lead an irresistible conclusion that the appellants were the authors of the crime.

(5) For extra judicial confession, they have placed reliance on decisions of the Apex Court rendered in the matter of ***Makhan Singh –vs- State of Punjab, AIR 1988 SC 1705*** and ***Kishore Chand –vs- State of Himachal Pradesh (1991) 1 SCC 286***. In Makhan Singh's case (supra), the Apex Court held that the extra judicial confession is a weak kind of evidence. In Kishore Chand's case (supra) it was held by the Supreme Court that the extra judicial confession must satisfy the requirement of sections 24, 25 and 26 of the Evidence Act which must be construed strictly. An unambiguous extra judicial confession possesses high probative value force as it emanates from the person who committed the crime and is admissible in evidence provided it is free from suspicion and suggestion of its falsity. But in the process of proof of the alleged confession, the Court has to be satisfied that it is a voluntary one and does not appear to be the result of inducement, threat or promise envisaged u/s 24 or was brought about in suspicious circumstances to circumvent sections 24, 25 & 26 of the Evidence Act. The Court has to look into the surrounding circumstances and to find whether the extra judicial confession is not inspired by any improper or collateral consideration or circumvention of the law suggesting that it may not be true one. Therefore, even the extra judicial confession will also have to be proved like any other fact. The value of the evidence as to the confession depends upon the

veracity of the witness to whom it is made, the time and place of making it and the circumstances in which it came to be made and the actual words used by the accused. Referring to these decisions, learned counsel for the appellants submitted that since the police had already come in the village and they had suggested the villagers to ask from the accused persons about the deceased, therefore, the confession made by the accused persons, does not appear to be voluntary and it appears to be with the indulgence of the police personnel.

(6) On the point of extra judicial confession one Seshnath (P.W.4) has been examined. He has stated that after hearing about the murder of the deceased, he alongwith other persons namely Bal Mukund (P.W. 8), Dharmendra, Baba Singh and Sunhar (P.W. 7) enquired from the accused persons asking them that they are hearing in the village about the murder of Bholu Ram. On this, accused Dulari stated that he had murdered the deceased alongwith the co-accused Itwara Bai. He has also stated that thereafter, a Panchnama about this confession was reduced into writing and the persons present there had signed it. P.W.7 Sunharlal is the other witness about the confession. He also stated vide para 2 of his evidence that the accused persons had told to them that they had murdered the deceased and had buried the dead body at the bank of river Sheonath. Bal Mukund (P.W.8) is another witness who also stated vide para 2 of his evidence that the accused persons were called by the villagers in Panchayat Bhawan and they had confessed that they had murdered the deceased and had buried the dead body at the Bank of River Sheonath. Though there are some

contradictions in the evidence of these witnesses but one thing which emerges from their evidence is that the appellants were called by the villagers in village Panchayat and they have made confession about the murder of the deceased and had also confessed that the dead body of the deceased was buried by them at the bank of river Sheonath. Nothing substantive has been brought on record against the testimonies of these witnesses and nothing has been suggested that they, in any manner, were interested in making false statement against the accused persons.

(7) So far as the police indulgence is concerned, it only comes in the evidence that the Police had also reached to the village and the persons of police department were there in a different room of the Gram Panchayat Bhawan and before asking about the deceased from the accused persons, the villagers had a talk with the Police. This does not mean that in fact, either the confession was made at the instance of the Police or it was made by their indulgence because except that the villagers were suggested by the Police to ask about the deceased from the accused, nothing adverse has been suggested against them. Mere presence of the Police in the village for purpose of investigation and permitting the villagers to enquire from the accused persons and during such time making confession by the wife and her paramour does not by itself vitiate the confession. It has not come on record that either the police was present in the room where the accused persons were called or the police had met with the accused persons or in any manner, the accused persons were having knowledge that the police had

also come to the village for investigation. It has not been suggested that the confession was made either by inducement, threat or promise or by making any influence on the accused persons. If evidence to this effect is given by the truthful witnesses who appear to be unbiased, not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that they may have a motive for attributing an untruthful statement to the accused and the words spoken are clear, unambiguous and unmistakably convey that the accused is the offender and nothing is omitted by the witness which may militate against it, after subjecting the evidence to rigorous test on the touch stone of credibility, if it passed the test, it can be accepted and can be the basis for conviction. ***Please see AIR 1985 SC 48 - State of U.P. Vs. M.K. Anthony.*** In the present case, the trial Court has rightly held the confession as a proved circumstance against the appellants.

(8) The other circumstance, regarding canvassing of the abscondence of the deceased by the appellant Itwara Bai comes in the evidence of her neibours PW-5 and PW-6. Gangabai (PW-5) has clearly stated that on the next morning of the incident, appellant-Itwara Bai had met with her and had said that Bholu Ram had run away from the village. Though she has been declared hostile by prosecution but this fact remained intact that the appellant-Itwara Bai told her that her husband (deceased) has absconded from the village. Likewise PW-6 Seorkha, has also stated that the appellant-Itwara Bai had told that her husband has absconded from the village due to fear of

the police on account of theft of wood committed by him. She has also disclosed that her husband (deceased) had taken a sum of Rs. 1000/- from the house. He has also been declared hostile on some other point but the fact regarding disclosure by the appellant in the above manner is intact in his statement. On the basis of evidence of these two witnesses, this circumstance appears against the appellant-Itwara Bai that from the very next day of incident, she tried to mislead the villagers by canvassing that her husband is absconding on account of theft so that they may not seriously notice his abscondence and may not think in the line of his murder/kidnapping etc. If this was the fact, which the wife was canvassing, then atleast after 10-11 days, as it comes in this case that the matter was not taken seriously till the said date, in usual manner, she should have reported the matter to the police or even to the village people for searching of her husband but it was not done and ultimately the confessional statement was made on 10.4.1998.

(9) The most important circumstance is the discovery of the dead body at the instance of the accused persons. In this regard the Investigating Officer S.S. Singh (PW-10), had recorded two discovery statements vide Ex-P-8 & Ex-P-9. Ex-P-8 is the memorandum of appellant Dulari. In this memorandum, he has indicated the place, where the dead body was buried and has also indicated about the various articles like *Tangi,* bicycle, *Phawda* etc. Ex-P-9 is the memorandum given by accused-Itwara Bai and she has also indicated the place of burying the dead body. PW-4 Shaisnath and PW-7 Sunhar Ram are the witnesses of memorandum before whom the statements were

made and they have proved the aforesaid documents. After this, the place was searched and the permission to exhume the dead body was obtained. PW-11- S.S. Dubey is the Executive Magistrate in whose presence the dead body was exhumed. He has stated that on 10.4.98, the S.D.M., Bilaspur has sent a memo (Ex-P-40) for exhuming the dead body of the deceased Bholu Ram. On the said memorandum, he had gone to village Jodhara and after meeting with the out-post in-charge, police out-post Pachpedi, he had gone to the spot and the place of burying the dead body was indicated by accused persons and the body was taken out. The body was identified and a *Panchnama* vide Ex-P-12 was prepared in his presence which bears his signature. He also deposed that in *Panchnama* (Ex-P-12), he had made an endorsement to this effect. He has further deposed that alongwith the dead body one *Chhadar*, one gunny bag (in which the dead body was kept) and a *loongi* of the deceased were also there. He further deposed that the photograph etc. were also taken.

(10) Nothing adverse has been brought against the said statement of this witness. The dead body was exhumed on 11.4.98 and after preparation of the *Panchnama* of the dead body, the aforesaid articles, which were found along with body, were also seized vide Ex-P-13. How the appellants came to know about the positioning of the body ? How they could come to know that the articles like gunny bag, bed-sheet, etc. were used for disposing of the dead body unless they had complicity with the crime ? This is not a case where the entire investigation was completed in one day and after discovery of body the forged

documents as memorandums etc. were prepared. It is note worthythat the memorandums of both the accused persons were prepared on 10.4.1998 and thereafter when the question of exhuming the dead body arose a permission was sought from the S.D.M., who granted permission, which was served upon the Executive Magistrate and thereafter the Executive Magistrate on the next day i.e. 11.4.98 went to the village and got the body exhumed in the manner indicated above. These are grave circumstancesagainst the appellants which go against them.

(11) It is a settled principle that 'in a case based on circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn have not only to be fully established but also that all the circumstances so established should be of a conclusive nature and consistent only with the hypothesis of the guilt of the accused. Those circumstances should not be capable of being explained by any other hypothesis, except the guilt of the accused and the chain of the evidence must be so complete as not to leave any reasonable ground for the belief consistent with the innocence of the accused. Legally established circumstances and not merely indignation of the court can form the basis of conviction and the more serious the crime, the greater should be the care taken to scrutinize the evidence lest suspicion takes the place of proof.' ***[Please see (1994) 2 SCC 220 – Dhananjoy Chatterjee alias Dhana Vs. State of W.B.]***.

(12) In the present case, trial Court has rightly taken the above circumstantial evidence into consideration which goes to suggest

that since both the appellants were having illicit relations with each other, they had strong motive to cause the murder of the deceased and a chain of the circumstantial evidence suggest that they caused the murder on 28.3.98 and thereafter caused disappearance of the dead body in the manner indicated above and they in planned manner tried to canvass in the village that the deceased is absconding on account of fear of the police but they ultimately could not succeed.

(13) The above circumstances irresistibly lead to the conclusion that the appellants were culprits of the crime and they have rightly been convicted by the trial Court. For the foregoing reasons, these appeals have no merits and the same are dismissed. The judgment of conviction and order of sentence awarded by the trial Court to both the appellants are hereby confirmed.

Sd/-
L.C. BHADOO
Judge

Sd/-
SUNIL KUMAR SINHA
Judge

Rao/V